85-1519

NO._____

Supreme Court U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS HOOPER, ET AL.,

Petitioner,

v.

WILLIAM DONTA, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

GENE W. HOLLIKER
Assistant Attorney General

State Office Tower,
30 East Broad Street, 26th Floor
Columbus, Ohio 43266
(614) 466-5414

COUNSEL OF RECORD FOR PETITIONER HOOPER

MARY JANE McFADDEN
McFadden and Sponseller
2727 Tuller Parkway
Dublin, Ohio 43017
(614) 764-0423

COUNSEL OF RECORD FOR PETITIONERS HUNTER, BROOKS, ROSE, ALTHERR, MORGAN, MANNERING AND ROBINSON

38pp

QUESTIONS PRESENTED

1. When a plaintiff fails to object to a jury being instructed to determine whether defendants in an action brought pursuant to 42 U.S.C. § 1983 acted in good faith, does Rule 51 of the Federal Rules of Civil Procedure bar the plaintiff from assigning as error on appeal the giving of the instruction?

2. May law enforcement officers, while conducting the search of a home pursuant to a valid search warrant, seize fifty (50) rifles not described in the warrant but found in plain view in the home, where there is probable cause to believe that the rifles may have been stolen?

3. Are law enforcement officers entitled to good faith immunity where they seize fifty (50) rifles not described in a search warrant but found during a search pursuant to the warrant, where it is not clearly established at the time of the search that the rifles were not found in plain view?

4. Is the state of the law clearly established so as to deny law enforcement officers good faith immunity where a Court of Appeals opinion decided prior to a search by the officers is effectively overruled by a later Supreme Court opinion?

PARTIES

The petitioners are Thomas Hooper, an investigator for the Ohio Department of Liquor Control; Charles F. Hunter, the former Sheriff of Jackson County, Ohio; and Jackson County Deputy Sheriffs Larry Brooks, Floyd Rose, Jeff Altherr, Jack Morgan, James Mannering and Anthony Robinson.

Respondent is William Donta, Jr.,

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit denying petitions for rehearing filed by both parties is unreported. (A-11). The decision of the United States Court of Appeals for the Sixth Circuit affirming in part and reversing in part the judgment of the District Court is reported as *Donta v. Hooper,* 774 F.2d 716 (6th Cir. 1985). (A-1). The order of the United States District Court for the Southern District of Ohio, Eastern Division denying Respondent's (Plaintiff in the District Court) motion for judgment notwithstanding the verdict and for new trial is unreported. (A-13). The judgment of United States District Court for the Southern District of Ohio, Eastern Division, is unreported. (A-15).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming in part and reversing in part the judgment of the District Court was entered on October 11, 1985. The decision of the United States Court of Appeals for the Sixth Circuit denying Petitioners' (Appellees in the Court of Appeals) petition for rehearing was entered on December 17, 1985. Jurisdiction is conferred pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourth Amendment to the Constitution of the United States.

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Rule 51, Federal Rules of Civil Procedure.

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

On December 26, 1979, Respondent William Donta, Jr. (Donta) filed a complaint in the United States District Court for the Southern District of Ohio, Eastern Division under 42 U.S.C. § 1983, alleging that he had been denied his rights under the Fourth Amendment as a result of an illegal search, seizure and arrest by Petitioners. Donta asserted that jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1343(1), (2), (3) and (4).

Pursuant to a search warrant issued by a local judge, Petitioners searched Donta's home and property on December 24, 1978. They were searching for evidence relating to the manufacture and sale of illegal intoxicating liquor. During the course of the search, the Petitioners found in plain view in two upstairs bedrooms eighty-six bags of marijuana that Donta admitted belonged to him and fifty firearms that also belonged to Donta.

When the firearms were found, seven or eight of them were picked up, their serial numbers were recorded, and the

serial numbers were taken downstairs where they were communicated by telephone to the sheriff's office. At the sheriff's office, the serial numbers were entered into the National Crime Information Center (NCIC) computer, with the result that four of the first five entered were listed as stolen.

After receiving the NCIC report, Petitioners took all of the firearms back to the sheriff's office where the remainder were run through the computer. None of the remaining firearms were listed as stolen.

Later that evening, Donta was arrested based on a teletype message that had been received from the Kentucky State Police, requesting that Donta be picked up for being in possession of four firearms that had been stolen in that state.

Upon trial to a jury, the District Court directed a verdict for Petitioners on the validity of the search warrant. The issue of Petitioners' good faith immunity with respect to the seizure of the firearms and the arrest of Donta was submitted to the jury, which found that Petitioners had acted in good faith.

The jury was given a specific instruction on good faith immunity. Before the instruction was given, counsel for Donta was given an opportunity to object to the instructions.

> The Court: If you will notice, the pages of the proposed instructions are numbered down in the right-hand corner. First, I'll call on counsel for the plaintiff to make any objections, requests, omissions, or additions to what's before you.
>
> Mr. Moore: Your honor, the plaintiff has no objection to the instructions as proposed.
>
> The Court: All right.

Thereafter, the instructions including an instruction on good faith were given to the jury. Also, the jury was submitted a special interrogatory on good faith as it related to the seizure of the firearms. Again, Donta did not object.

On appeal, the Court of Appeals determined in a decision filed on October 11, 1985 that a directed verdict had been properly entered on the validity of the search warrant. The Court also held that eventhough the question of good faith with regard to the arrest should not have been submitted to the jury, Petitioners were entitled to good faith immunity because it had not been clearly established that law enforcement officers may not rely on a teletype message to arrest a person where the message does not recite the existence of a warrant.

As to the seizure of the firearms, the Court of Appeals similarly held that the jury was erroneously submitted the issue of good faith immunity. The Court made no reference in its opinion to Petitioner's argument in their brief that Donta was barred by Rule 51 of the Federal Rules of Civil Procedure from assigning as error the giving of an instruction on good faith because of his failure to object to the instruction at trial. The Court determined that Petitioners were not entitled to good faith immunity because it had been clearly established that a seizure of firearms under the facts of this case could not be supported as a plain view search.

The Court of Appeals directed the District Court to enter judgment for Donta on the seizure of the firearms and remanded for a determination of damages.

Petitioners filed a petition for rehearing on October 24, 1985, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, requesting the Court of Appeals to decide an issue not addressed in its opinion of October 11, 1985, whether Donta was barred from arguing on appeal that the jury should not have been instructed on good faith by failing to object at trial to the instruction. The Court of Appeals denied Petitioners' motion on December 17, 1985.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Is In Direct Conflict With Rule 51 Of The Federal Rules Of Civil Procedure And So Far Departs From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Power Of Supervision.

The Court of Appeals' decision is in direct conflict with Rule 51 of the Federal Rules of Civil Procedure. Rule 51 contains a clear and unambiguous statement that there must be a timely objection to preserve for appeal any instruction given to a jury.

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Donta did not object to the jury being instructed to decide the issue of Petitioners' good faith. The Court of Appeals held that it was improper for the District Court to submit this issue to the jury without offering any explanation of how it could decide this issue absent an objection by Donta.

The Court of Appeals' failure to apply Rule 51 to this case so far departs from the accepted course of judicial proceedings, as reflected by the Rule, as to call for this Court's power of supervision.

II. The Decision Of The Court Of Appeals Is In Direct Conflict With This Court's Decision In *Texas v. Brown*, 460 U.S. 730 (1983).

The Court of Appeals discussed the plain view doctrine only in relation to the issue of good faith immunity, finding that this Court's most recent plain view case, *Texas v. Brown*, 460

U.S. 730 (1983), was inapplicable to the good faith question because it was issued after the seizure in this case occurred. 774 F.2d at 719-720. Even so, the Court noted that *Texas v. Brown* had "modified the operative language of the plain view doctrine...." *Id.* at 719.

Texas v. Brown is directly applicable to this case because, if the search was a valid plain view search, the question of good faith is irrelevant. Petitioners argued on appeal to the Court of Appeals that the seizure should be directly upheld as a plain view search under *Texas v. Brown,* but the Court discussed plain view only as it related to good faith.

Prior to *Texas v. Brown,* most courts analyzed the plain view doctrine in light of the plurality opinion in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). There, it was found that the incriminating nature of evidence found in plain view must be "immediately apparent" to the officers. *Id.* at 466.

This standard was considerably altered in *Texas v. Brown.* There, police officials set up a routine driver's license checkpoint. When the defendant's automobile was stopped at the checkpoint, a police officer observed an opaque party balloon, knotted at the tip, in the automobile. The officer had knowledge that illegal drugs were sometimes concealed in this manner. When the driver could not produce a driver's license, he was requested to get out of the automobile. The balloon was then removed from the automobile, and found to contain heroin, thereby resulting in the defendant's conviction for possession of heroin.

The Texas Court of Appeals found that the plain view doctrine could not authorize the seizure of the heroin because at the time of the seizure, the officer could not have known it contained heroin. The Supreme Court reversed.

Although this was an automobile search case, the Court's holding was not based on the specialized area of automobile searches, but on the generalized concept of the plain view doctrine. The Court recited several general principles concerning this doctrine.

> "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be. *Id.* at 738-739.
>
> . . . .
>
> [O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it. *Id.* at 739.

The Court next cast considerable doubt on the continuing viability of the immediately apparent standard used in *Coolidge.*

> Decisions by this Court since *Coolidge* indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminating character of evidence is necessary for an application of the "plain view" doctrine. *Id.* at 741.

Rather then continuing the test of immediately apparent evidence of a crime, the Court held that objects in plain view may be seized if

> the facts available to the officer would "warrant a man of reasonable caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. (citation omitted). *Id.* at 742.

Applying this test, the Court determined that the officer had probable cause to believe that the balloon contained illegal drugs, therefore making its seizure permissible.

Consequently, the standard to be applied in this case is whether Petitioners had probable cause to seize the fifty guns found in plain view at the Donta residence while executing a search warrant for illegal alcohol and related items.

The Petitioners were lawfully in the Donta house conducting a search pursuant to a search warrant. Because they were searching for illegal alcohol and the means and raw materials for its manufacture, they conducted a thorough search of the entire house, looking into any place where these items could be found, including closets, drawers and cabinets. While searching the house, they found eighty-six bags of marijuana and fifty firearms in two upstairs bedrooms. Serial numbers of seven or eight of the guns were copied and the serial numbers taken downstairs to be telephoned to the sheriff's office for checking through the NCIC computer. When four of the first five guns were reported as stolen, all of the guns were taken to the sheriff's office.

Based on these facts, a seizure of Donta's guns occurred only after Petitioners learned that four of them had been stolen, since a seizure of property occurs only where there has been "some meaningful interference with an individual's possessory interest in that property." *United States v. Karo,* ___ U.S. ___, 81 L. Ed. 2d 530 (1984), citing *United States v. Jacobson,* ~~___ U.S.~~ ___, 80 L. Ed. 2d 85 (1984). When Petitioners picked up the guns merely to record their serial numbers, there was no meaningful interference with Donta's possessory interest in the guns, since they remained where they were found in an upstairs bedroom in Donta's home. Viewing the serial numbers created no greater intrusion into the privacy of Donta's home than already had occurred pursuant to the authority of the search warrant. *See, Segura v. United States,* ___ U.S. ___, 82 L. Ed. 2d 599 (1984). He therefore retained his possessory interest in the guns until they were seized after the NCIC computer check.

When the seizure occurred, Petitioners clearly had probable cause to believe the guns were stolen. Four of the first five checked were reported as stolen. It was entirely

reasonable for the officers to believe that the remainder also could have been stolen. Probable cause therefore existed for the seizure of all fifty firearms.

Even if recording the serial numbers would be considered to be a seizure, probable cause existed at that point to believe the guns to be stolen, even before the NCIC check had been made.

The weapons were found in the same house as were eighty-six bags of marijuana that Donta admitted were his. Finding such a large quantity of marijuana could lead the Petitioners to reasonably believe that Donta was engaging in the sale of that illegal substance. When a large number of firearms were also found on the same premises as the marijuana, it was equally reasonable for the officers to conclude that there was little likelihood Donta had that number of guns for any legitimate use, but was in fact also dealing in stolen guns.

The decision of the Court of Appeals conflicts with *Texas v. Brown* in that the Court failed to apply the plain view doctrine articulated in that case. Applying that doctrine to the facts of this case results in the conclusion that the seizure of the weapons did not violate the Fourth Amendment.

III. The Decision Of The Court Of Appeals Is In Direct Conflict With This Court's Decision In *Davis v. Scherer*, ___ U.S. ___, 82 L. Ed. 2d 139 (1984).

Law enforcement officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, ___ U.S. ___, 82 L. Ed. 2d 139, 147 (1984), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Court of Appeals applied this standard in such an overly technical manner that it leaves law enforcement officers at their peril should they be unaware of the case law in a particular area or interpret the case law in a manner different than a reviewing court. The Court examined two Sixth Circuit opinions in determining whether Petitioners' seizure of Donta's weapons violated a clearly held constitutional right.

In *United States v. Gray,* 484 F.2d 352 (6th Cir. 1973), a search warrant was issued for the search of a small grocery store, where police officers sought to discover beer that was being sold without a license. The warrant directed the seizure of any intoxicating liquors along with the aparatus or materials used in the manufacture of same. During the course of the search, a quantity of beer was found and seized. Also, two rifles were found in a clothes closet. The serial numbers of the rifles were recorded and the rifles returned to the closet. The serial numbers were later run through the NCIC computer and found to have been stolen. A second search warrant was issued for the rifles. The store owner was subsequently convicted of a federal firearms violation.

The issue on appeal was whether the plain view doctrine justified the police in copying the serial numbers when the search warrant did not specify a search for stolen guns. In deciding this issue, the Court relied on the language in *Coolidge v. New Hampshire,* 403 U.S. 443, 466 (1971) that when police seize evidence under the plain view doctrine, the incriminating nature of the evidence must be "immediately apparent" to the officers. Because the officers in *Gray* did not know the guns were stolen until after the serial numbers were recorded and the NCIC check was made, the Court ruled that when the guns were found it was not immediately apparent that they were stolen and, therefore, they were improperly seized.

In *United States v. Truitt,* 521 F.2d 1174 (6th Cir. 1975), the Court in a similar situation applied the immediately apparent standard, but tempered it by the finding that police need only probable cause to believe they have found incriminating evidence in plain view. At issue was the seizure of a sawed-off

shotgun that was seized when found in plain view during a search of a gun and tackle shop for gambling paraphernalia, where the shotgun was not described in the search warrant. The defendant was convicted of a federal firearms violation, possession of an unregistered sawed-off shotgun. When the shotgun was seized, the police had no knowledge that it was unregistered. Because possession of a registered sawed-off shotgun was not illegal, the defendant argued that under *Gray* it was not immediately apparent that the shotgun was unregistered and therefore not properly seized. The Court disagreed and formulated the plain view test to be applied thusly:

> The inquiry, we think, therefore, is not primarily whether the object is contraband, but whether its discovery under the circumstances would warrant a police officer of reasonable caution in believing that an offense has been or is being committed and that the object is evidence incriminating the accused. *Id.* at 1177.
>
> . . . .
>
> We hold police officers to a *standard* not of after-acquired statistical probability, but rather to the conduct of "reasonable men, acting on facts leading sensibly to their conclusions of probability." (citation omitted). *Id.*

The court concluded that there was probable cause to believe that the shotgun was incriminating evidence, even though found in a gun shop, because the shop had been linked to illegal gambling activity and there was little legitimate use for a sawed-off shotgun.

Applying these cases to the facts of this case, it cannot be said that the seizure of Donta's guns violated a clearly established constitutional right. While the facts in *Gray* are arguably very similar to the facts in the present case, there is also a very close parallel to the later *Truitt* case.

In *Truitt,* evidence of illegal gambling was found on the premises; here eighty-six bags of marijuana Donta admitted were his were found. In *Truitt,* a sawed-off shotgun, though not identifiable as illegal until checked, was found; here fifty guns, equally not identifiable as stolen until checked, were found. Probable cause to seize the shotgun existed in *Truitt* because it was found where an illegal activity was taking place and there was little legitimate reason for its use. Here as well, the fifty guns were found where an illegal activity was taking place, which at the very least was possession of marijuana.

While the Court of Appeals' decision offers one possible analysis of *Gray* and *Truitt,* it is no less reasonable to argue that *Truitt* permits the seizure in this case. Petitioners are entitled to rely on the *Truitt* decision as permitting them to seize Donta's guns. Certainly, it is not clearly established that the seizure was not lawful under *Truitt.*

The underlying assumption in the Court of Appeals' decision is that law enforcement officers must be able to predict how a reviewing Court will apply precedent to subsequent cases where the underlying facts may be similar but at the same time slightly different. The Court of Appeals has placed an unreasonable burden on Petitioners, demanding that they have knowledge of and interpret two narrowly defined cases in the same manner as the Court.

The decision of the Court of Appeals directly conflicts with *Davis v. Scherer* by disregarding the Courts' holding that the clearly established constitutional right must be one of which a "reasonable person" would have been aware. While it is reasonable to expect that law enforcement officers should be aware of such well known rights as giving Miranda warnings at an arrest or basing a search warrant on probable cause, it is not reasonable to expect that they should make the very fine distinctions made by the Court of Appeals in distinguishing *Truitt* from the instant case.

It is further unreasonable to expect that officers would have knowledge of the hundreds of decisions written by courts that define the parameters of searches permissible under the Fourth Amendment. When conducting a search, law enforcement officers must often make immediate, on-the-spot decisions as to how the search should be conducted. Under these circumstances they cannot know for certain all of the many prior cases that may have some bearing on their actions. Nor can they predict how a court reviewing their actions may subsequently apply or interpret those cases.

Any right that requires the type of technical analysis of prior cases made by the Court of Appeals in this case cannot be said to be a clearly established right of which a reasonable person would have been aware.

The Court of Appeals' decision reaches an inequitable result for an additional reason. The Court of Appeals recognized that in *Texas v. Brown* "the Court modified the operative language of the plain view doctrine. . .," but determined that *Texas v. Brown* was irrelevant to the issue of good faith because it was announced subsequent to when the search in this case occurred. 774 F.2d at 719. The Court of Appeals' reasoning places Petitioners in an unfair position. They are denied good faith immunity because the search they conducted was found to be inconsistent with *Gray*, which relied on *Coolidge*, and which in turn was effectively overruled by *Texas v. Brown* after the search had occurred. Petitioners were denied immunity because of what now clearly appears was an incorrectly decided decision in *Gray*.

Contrary to the Court of Appeals' reasoning, *Texas v. Brown* is directly relevant to the question of good faith because it was not until that decision that the law relating to plain view searches was clearly established. *Coolidge* certainly did not clearly establish the law in this area, because it was the opinion of only four Members of the Court and was thus "not a binding precedent." *Texas v. Brown*, 460 U.S. at 737. Since *Gray* was based on *Coolidge*, it too could not be considered to clearly establish the law of a permissible plain

view search. By the Court of Appeals' own admission, the language in *Coolidge* (the immediately apparent standard) upon which it had relied in deciding *Gray* had been "modified" by *Texas v. Brown.*

Because the scope of a plain view search had not been clearly established until the announcement of this Court's opinion in *Texas v. Brown,* Petitioners are entitled to good faith immunity for a search conducted prior to the date of and entirely consistent with that opinion.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

GENE W. HOLLIKER
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266
(614) 466-5414

COUNSEL OF RECORD FOR PETITIONER HOOPER

MARY JANE McFADDEN
McFadden and Sponseller
2727 Tuller Parkway
Dublin, Ohio 43017
(614) 764-0423

COUNSEL OF RECORD FOR PETITIONERS HUNTER, BROOKS, ROSE, ALTHERR, MORGAN, MANNERING AND ROBINSON

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served upon Respondent William Donta, Jr., by forwarding such copies to his counsel, James H. Moore, III, Campbell, Woods, Bagley, Emerson, McNeer and Herndon, P.O. Box 1862, Ashland, Kentucky 41105, by United States Mail, postpaid, this _____ day of March, 1986. I further certify that all parties required to be served have been served.

GENE W. HOLLIKER
Assistant Attorney General

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 84-3288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM DONTA, JR.,
Plaintiff-Appellant,

v.

THOMAS HOOPER; CHARLES F. HUNTER; LARRY BROOKS; FLOYD ROSE; JEFF ALTHERR; JACK MORGAN; JAMES MANNERING; ANTHONY ROBINSON,
Defendants-Appellees,

STATE OF OHIO, et al.,
Defendant.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 11, 1985

Before: LIVELY, Chief Judge; JONES, Circuit Judge; and WEICK, Senior Circuit Judge.

PER CURIAM. Plaintiff-Appellant, William Donta, Jr. brought suit under 42 U.S.C. § 1983 for illegal search, illegal seizure of property, and illegal arrest. The district court directed a verdict for the defendants on the issue of the search. A jury found that good faith immunity protected the

defendants with regard to the seizure and arrest. On appeal, Donta challenges the directed verdict and argues that under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the district court improperly placed the purely legal issue of the defendants' good faith immunity before the jury. Upon consideration of the issues raised on appeal, we affirm the directed verdict, reverse the judgment on the question of illegal seizure, and affirm the judgment that the officers are eligible for good faith immunity on the issue of the arrest.

I.

Donta and his family lived outside of Oak Hill, Ohio on a 308 acre working farm. Herb McFann, Bobby Simpson, and Everett Hall, Jr. spent the afternoon of December 23, 1978 cutting firewood on Donta's farm. During the afternoon, the three men began drinking. On his way into town at the end of the afternoon, Donta left a "fifth" bottle of eggnog, which his wife had prepared, in McFann's truck as a Christmas present. After leaving Donta's farm late in the afternoon, Simpson and McFann went to a local tavern known as the "Swamps," where McFann drank a large amount of whisky as part of a drinking contest. McFann was unconscious when he was brought home from the Swamps, and was pronounced dead soon thereafter. Dr. John Cook, the deputy county coroner, subsequently determined that McFann died due to asphyxiation resulting from rapid drinking of alcohol.

On December 23, 1978 Jackson County Deputy Sheriff Larry Brooks, a fourteen-year veteran, learned of McFann's death from the sheriff's dispatcher and went to McFann's residence to investigate. He was told that McFann had been drinking moonshine the day before at Donta's farm, and that McFann had engaged in the drinking contest at the Swamps. At Brooks' request, Thomas Hooper, an agent with the Ohio Department for Liquor Control, came to Jackson County to investigate the possibility that moonshine contributed to McFann's death.

Brooks and Hooper first returned to McFann's residence and then interviewed Simpson, who told them that he had seen a moonshine still on Donta's property. Simpson is of limited intelligence. After observing him in court, the trial judge found Simpson to be visibly and demonstrably handicapped, childlike despite his thirty-one years, but reliable. Brooks testified that he believed Simpson's statements because of the detail with which he described the moonshine still.

On the basis of Simpson's statements, Hooper swore out an affidavit in which he averred that he had "interviewed a confidential informant who has within the past 72 hours personally observed illicit spiritous liquor (moonshine) at the residence of William Donta." Brooks and Hooper then went before a local judge who issued a search warrant for Donta's property. Brooks and Hooper told the judge that their informant was available outside if the judge wanted to question him. They did not inform the judge of Simpson's limited intellectual capacity.

Pursuant to the search warrant, a party of officers searched Donta's property and home during the afternoon of December 24, 1978. The search party did not discover a moonshine still or any illegal alcohol. They did find a substantial amount of marijuana and Donta's collection of approximately fifty firearms. Donta testified that he acquired the firearms one at a time over the course of thirty-three years, buying some new, some used, and trading for others. A deputy called the serial numbers of approximately seven guns to the sheriff's dispatcher, who ran the numbers through the National Crime Information Center (NCIC) computer. The computer reported that four of the first five guns were listed as stolen. Although this inquiry was rapidly completed at Donta's home, all of the guns were transported to the county sheriff's office. Donta arrived home during the search and accompanied the officers to the sheriff's office, where he participated in checking the serial numbers of his guns.

Later in the evening of December 24, 1978, after all of Donta's firearms had been run through the NCIC computer without uncovering any more stolen weapon entries, Donta was arrested on the basis of a teletype message from the Kentucky State Police which read in part:

> Request you pick up a Bill Donta, white male, approximately 55 years of age. We have info that he has or had in his possession four weapons which were taken in a burglary in our district during 1975.

Donta was booked on a charge noted as "hold for B.A.T.F. [Bureau of Alcohol, Tobacco and Firearms] and K.S.P. [Kentucky State Police]." Donta was held by the Jackson County Sheriff from late in the evening on December 24, until approximately 11 a.m. on the morning of December 26, 1978. He was released when, after several inquiries, the Kentucky State Police informed the Jackson County Sheriff that they did not have a warrant for Donta's arrest and could not expect to get one. No question is raised on appeal regarding the duration of Donta's incarceration.

II.

First, Donta challenges the district court's decision to grant a directed verdict to the defendants on the issue of whether the officers made intentional or reckless misstatements of fact to the local judge when they sought the search warrant. A district court properly grants a motion for a directed verdict if the evidence, viewed in the light most favorable to the non-moving party, presents no issue of fact upon which reasonable minds could disagree. *See Grimm v. Leinart,* 705 F.2d 179, 181 (6th Cir. 1983).

Both parties agree that law enforcement officers are not liable for their actions in executing a search warrant that was obtained by making negligent statements or omissions of fact to the issuing magistrate. Donta maintains that he created a question of fact upon which reasonable minds could disagree,

under *Franks v. Delaware,* 438 U.S. 154 (1978), concerning whether the officers obtained the search warrant by making statements either with reckless disregard for the truth or knowing those statements to be false. The defendants emphasize that *Franks* involved suppression of evidence in a criminal prosecution and maintain that in civil actions officers will be liable only if they intentionally misrepresented facts on which the magistrate issued the warrant.

Under either standard, there is no factual question for the jury on the issue of whether the search was illegal. Donta maintains that the officers misled the issuing judge when they presented him with an affidavit in which Hooper stated that he had "interviewed a confidential informant who has within the last 72 hours, personally observed illicit spiritous liquor (moonshine) at the residence of William Donta." The officers also allegedly orally characterized their informant, Bobby Simpson, as reliable when he was not, and failed to identify him to the issuing judge.

At trial, Simpson testified that he had seen Donta give McFann eggnog, that he knew what moonshine and a moonshine still were, that he had seen a moonshine still on Donta's farm, and that he had told the truth when Brooks and Hooper interviewed him. Both Officers Brooks and Hooper stated that they found Simpson believable because of the detail with which he was able to describe the still he claimed to have seen at the farm. When the officers went to the judge's home to secure the warrant, they took Simpson with them and informed the judge that he was available for questioning. Upon hearing Simpson's testimony, the district court characterized him as childlike but reliable. There is no evidence from which a reasonable jury could find that the defendants intentionally or recklessly misrepresented Simpson as a reliable observer.

III.

Donta also challenges the district court's denial of his motion for a directed verdict on his claim that the defendants

were not entitled to good faith immunity for the seizure of his firearms. The relevant facts are not in dispute. While searching Donta's home under the search warrant authorizing seizure of illegal liquor or related equipment, the defendants discovered approximately fifty firearms. The defendants do not allege that the firearms had been altered in any way. Without further basis, the sheriffs fed the serial numbers of seven firearms into the NCIC computer. Donta alleges that the firearms were illegally seized. The defendants contend that the firearms were properly seized under the plain view doctrine. The district court found as a matter of law that the sheriffs did not have reason to seize the guns under the plain view doctrine. The district court, however, placed the question of the officers' good faith before the jury, which found that the officers were immune from liability under the doctrine of qualified immunity.

As an initial matter, it was improper for the district court to give the jury the issue of the defendants' objective good faith. Under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this is purely a legal question to be determined by the trial judge prior to trial. In discussing *Harlow,* this Court recently concluded that:

> The trial judge is to apply this purely objective test as a matter of law before discovery occurs. If the law which the defendant is alleged to have violated is clearly established, then the qualified immunity defense should fail and discovery should proceed. If the law is not clearly established, the defendant is immune.

Windsor v. The Tennessean, 719 F.2d 155, 165 (6th Cir. 1983), *cert. denied,* 105 S. Ct. 105 (1984).

The scope of the plain view doctrine was clearly established at the time defendants seized Donta's guns. Under *Cooledge v. New Hampshire,* 403 U.S. 443, 466 (1971), when police seize evidence under the plain view doctrine, the incriminating nature of the evidence must be "immediately apparent" to the officers. In *Texas v. Brown,* 103 S. Ct. 1535 (1983), the Court modified the operative language of the plain

view doctrine, but *Texas v. Brown* is irrelevant to the present case. Under *Harlow* this Court looks to the law as it existed at the time of the official behavior for which the defendants seek immunity. *Harlow,* 457 U.S. at 818.

United States v. Gray, 484 F.2d 352 (6th Cir. 1973), *cert. denied,* 414 U.S. 1158 (1974), involved application of the plain view doctrine under a set of facts which are essentially identical to the facts of the present case. The Court found that the plain view doctrine did not justify seizure of firearms found while executing a search warrant for evidence of illegal sales of beer.

> Here, Officer Brodt inadvertently discovered the rifles in the upstairs clothes closet while searching for alcoholic beverages but it was not "immediately apparent" that the rifles were "evidence incriminating the accused." The rifles were not contraband; there was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers at that time have any knowledge that the rifles were evidence of any other crimes. It was only after Trooper Brodt had seized the weapons, copied down the serial numbers, left the defendant's premises, and then run the information taken off the rifles through the National Crime Information Center that he learned that they were stolen and hence incriminating. This can hardly be chacterized as being "immediately apparent." To allow the police to seize objects, unincriminating at the time of seizure, would not in our view comport with the plain view doctrine.

Gray, 484 F.2d at 355.

The defendants maintain that their right to seize the firearms under the plain view doctrine was established by *United States v. Truitt,* 521 F.2d 1174 (6th Cir. 1975), which distinguished *Gray.* In *Truitt,* police seized a sawed-off shotgun which was discovered in plain view during a search

of a gun and tackle shop for gambling paraphernalia. The Court found the seizure legal on the basis that the proper test is not whether a particular "object is or is not contraband. A sawed-off shotgun, properly registered to its owner, is not contraband, but its lawful possession is, in ordinary experience, rare indeed. There is very little legitimate use for such a weapon. The question is one of probability." *Truitt,* 521 F.2d at 1177. Even under the rule of *Truitt,* however, seizure of Donta's guns was not objectively reasonable. Nothing about Donta's gun collection raised a probability of illegal possession.

The rule of law under *Gray* and *Truitt* was clearly established in 1978 at the time the defendants seized Donta's guns. In fact, in *Gray,* the Court noted that it had expressly accepted and applied this interpretation of *Coolidge v. New Hampshire* on several prior occasions. *Gray,* 484 F.2d at 355 n.7. As the district court found, the defendants in the present case violated that clear rule. The defendants' subjective good faith in seizing the guns and the jury's finding regarding the defendants' good faith are irrelevant under *Harlow.* Therefore, we reverse the judgment for the defendants based upon the jury finding that the defendants acted in good faith. We direct the district court to enter judgment for Donta based on the jury finding that the defendants seized the guns. We affirm the district court's holding that the seizure occurred without probable cause. This question is remanded for determination of damages.

IV.

Finally, Donta challenges the district court's denial of his motion for a directed verdict on his claim that the defendants were not entitled to good faith immunity for his arrest. The Jackson County Sheriff arrested Donta on the basis of a teletype message from the Kentucky State Police. The teletype requested the Sheriff to "pick up a Bill Donta .... We have info that he has or had in his possession four weapons that were taken in a burglary ...." The teletype then identified the four

weapons that the NCIC computer had identified as stolen and that the Sheriff knew to have been in Donta's possession.

The district court found as a matter of law that the officers did not act on probable cause when they arrested Donta. The district court submitted to the jury the issue of the officers' objective good faith when they arrested Donta. The jury found that the officers had acted in good faith and that they were eligible for qualified immunity. As we noted above, under *Harlow v. Fitzgerald,* the officers' objective good faith was not properly a question for the jury. Nonetheless, as we conclude that the officers' conduct did not violate a clearly established rule of federal law when they arrested Donta, we affirm the jury verdict on this issue.

Donta had a clearly established federal right not to be arrested without probable cause. Probable cause is based upon knowledge or reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed. *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) (quoting *Carrol v. United States,* 267 U.S. 132, 162 (1925)). The decisive issue in applying *Harlow* to the present case is whether at the time of Donta's arrest it was clearly established as a matter of federal law that the information on which the officers arrested Donta did not amount to probable cause. The defendants knew that four guns in Donta's possession had been reported stolen. When the teletype arrived from the Kentucky State Police requesting the Sheriff's department to "pick up" Donta because he possessed the stolen guns, the defendants arrested him.

Donta maintains that because the teletype did not recite the existence of a felony warrant for Donta's arrest, the defendants violated a clearly established rule by arresting him. Donta, however, is unable to cite any federal statutory or case authority which holds that a teletype from one police agency to another will establish probable cause to arrest only if the teletype recites the existence of a warrant. The defendants maintain that at the time of Donta's arrest it was clearly established that law enforcement officers could reasonably

rely on a teletype from another department. The defendants refer to dicta in *Whiteley v. Warden,* 401 U.S. 560 (1971), to support this proposition. *Whiteley* was a habeas action in which police arrested the petitioner on the basis of a radio bulletin. The department that issued the bulletin in *Whiteley,* however, possessed a warrant. *Id.* at 564 n.5. The Supreme Court suppressed evidence secured incident to the arrest on the ground that the warrant was not supported by probable cause and, therefore, the arrest was illegal. The defendants in the present case rely on dicta in *Whiteley* in which the Court noted that "[w]e do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin." *Whiteley,* 401 U.S. at 568. The Court continued, however, by observing that "police officers called upon to aid other officers *in executing arrest warrants* are entitled to assume that the officers requesting aid *offered the magistrate the information requisite to support an independent judicial assessment of probable cause." Id.* (emphasis added). This dicta does not clearly establish the reasonableness of relying upon a bulletin that is not supported by a warrant.

We do not hold that the sheriffs possessed information that established probable cause to arrest Donta. The district court concluded that the defendants lacked probable cause and the defendants have not appealed from that ruling. We find no reason to disturb the district court's conclusion. We also, however, find no reason to disturb the verdict that the officers were entitled to qualified immunity because they did not violate a clearly established federal rule by arresting Donta on the basis of the teletype. The narrow holding of the Supreme Court in *United States v. Hensley,* 105 S. Ct. 675 (1985), illustrates that it remains an open question how much reliance law enforcement officers may reasonably place upon a bulletin from another department that does not recite the existence of an arrest warrant.

For the foregoing reasons, we AFFIRM the judgment below in favor of the defendants on the issues of the search and the arrest. We REVERSE the judgment below on the issue of the seizure of Donta's guns, direct the district court to enter judgment in favor of Donta, and REMAND for a determination of damages.

No. 84-3288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM DONTA, JR.,
Plaintiff-Appellant,

v.

THOMAS HOOPER; CHARLES F. HUNTER; LARRY BROOKS; FLOYD ROSE; JEFF ALTHERR; JACK MORGAN; JAMES MANNERING; ANTHONY ROBINSON,
Defendants-Appellees.

ORDER

Filed Dec. 17, 1985

BEFORE: **LIVELY,** Chief Judge; **JONES,** Circuit Judge; and **WEICK,** Senior Circuit Judge.

Both the appellees and appellants have petitioned the Court to rehear its decision of October 11, 1985, affirming in part and reversing in part the judgment of the district court.

The Court has considered the appellees' petition and the memorandum offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehended, the petition is found not well taken. It is therefore ORDERED that appellees' petition for rehearing and their accompanying motion to file a supplemental appendix are DENIED.

The Court has also considered the appellants petition and the memorandum offered in support thereof. Appellants seek costs on appeal in order that they may move for

attorneys' fees. The requirement of an award of cost as a prerequisite to an award of attorneys fees under 42 U.S.C. § 1988 has been dispensed with in this circuit. *See Kelley v. Metropolitan County Board of Ed.*, No. 83-5175/5243, slip op. at 7 (6th Cir. *en banc*, Sept. 23, 1985). Accordingly, it is ORDERED that appellant's petition is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ clerk signature deleted

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William Donta, Jr.,
Plaintiff

v.

Thomas Hooper, et al.,
Defendant

Case No. C-2-79-1184

Filed March 8, 1984

ORDER

This matter is before the Court on plaintiff's motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) and his motion for a new trial pursuant to Fed. R. Civ. P. 59(a). This matter was tried to a jury, and on January 31, 1984, a verdict was rendered in favor of all defendants on all claims.

At trial the Court granted defendants a directed verdict on the issue of the validity of the search warrant. The Court found that no evidence of an intentional misrepresentation of fact had been proffered by plaintiff. The Court also denied plaintiff's motion for a directed verdict on the issue of the defendants' good faith immunity in connection with the seizure of guns from the Donta farm. The Court found that defendants had presented sufficient evidence to make the issue of good faith immunity a question of fact for the jury.

Upon careful review and consideration of plaintiff's arguments, the evidence at trial, and in light of all rules pertaining to the granting of a judgment notwithstanding the verdict or a motion for a new trial, the Court finds that plaintiff's motions are not well taken. The Court remains unconvinced

that plaintiff proffered sufficient evidence to present the question of intentional misrepresentation of fact to the jury. The Court is also convinced that defendants presented sufficient evidence of good faith to present the question of good faith immunity to the jury.

Accordingly, plaintiff's motion for a judgment notwithstanding the verdict or in the alternative for a new trial is DENIED.

So ORDERED.

/s/ Robert M. Duncan
Robert M. Duncan, Judge
United States District Court

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN OHIO

William Donta, et al.

v.

Thomas Hooper, et al.

Docket Number: **C-2-79-1148**

Judge: **Honorable Robert M. Duncan**

Filed Feb. 1, 1984

JURY VERDICT. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

With respect to plaintiff William Donta's first claim, Judgment in favor of defendants Sheriff Hunter and Deputy Robinson.

With respect to plaintiff William Donta's second claim, Judgment in favor of defendants Sheriff Hunter and Deputy Robinson.

With respect to plaintiff William Donta's third claim, Judgment in favor of all the defendants Hooper, Hunter, Alther, Morgan and Mannering), and against plaintiff Donta.

With respect to plaintiff Donta's Fourth claim, Judgment in favor of defendants Sheriff Hunter and Deputy Rose, and against plaintiff Donta.